

SUPER PACS: WHERE THEY CAME FROM AND WHAT WE KNOW ABOUT
DARK MONEY SEVEN YEARS LATER

by
CATRINA CATHERINE CURTIS

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of
the requirements of the Sally McDonnell Barksdale Honors College.

Oxford
May 2019

Approved by

Advisor: Professor Marvin King

Reader: Professor Jonathan Winburn

Reader: Professor Robert Brown

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ABSTRACT

CATRINA CURTIS: Super PACs: Where They Came from and What We Know About
Dark Money Seven Years Later
(Under the direction of Marvin King)

The purpose of this thesis is to explore Super PACs as a source of campaign finance and their impact on the federal elections process. After explaining the history of federal campaign finance law in the United States, the role of anonymity by Super PACs is questioned. This thesis argues that two court case decisions are responsible for the creation of Super PACs: *Citizens United v. FEC* and *SpeechNOW.org v. FEC*. The cases, and their conflicting interests, are both summarized and analyzed. Next, using federal campaign finance data from the past decade, the impact of Super PACs on campaign finance is both described and analyzed. These data are used to draw conclusions about the immense impact the dark money produced by Super PACs has had on recent election cycles and on the modern era of campaign finance. The struggle between anonymous big money donations and democracy is discussed. It is concluded that Super PACs are incompatible with an open and equal democracy, as they allow unlimited, anonymous donations to overpower the interests of individuals.

TABLE OF CONTENTS

<i>LIST OF ABBREVIATIONS</i>	5
<i>CHAPTER I- Why Super PACs?</i>	6
<i>Early Campaign Finance Law</i>	7
<i>Modern History of Campaign Finance Law: Super PACs</i>	8
<i>Federal Elections Campaign Act</i>	12
<i>Bipartisan Campaign Reform Act</i>	13
<i>Introduction of Super PACs: Size and Donor Anonymity</i>	15
<i>Does Anonymity Matter?</i>	17
<i>Independent Expenditures</i>	20
<i>CHAPTER II- CITIZENS UNITED V FEC</i>	23
<i>Argument of the Plaintiff</i>	24
<i>Argument of the Defendant</i>	25
<i>Majority Opinion</i>	27
<i>Dissenting Opinion</i>	31
<i>CHAPTER III- SPEECHNOW.ORG V FEC</i>	34
<i>Argument of the Plaintiff</i>	35
<i>Argument of the Defendant</i>	39
<i>Decision</i>	41
<i>CHAPTER IV- SUPER PACS BY THE NUMBERS</i>	43
<i>CHAPTER V- CONCLUSION</i>	49
<i>REFERENCES</i>	58

LIST OF ABBREVIATIONS

PAC	Political Action Committee
FEC	Federal Election Commission
FECA	Federal Election Commission Act
BCRA	Bipartisan Campaign Reform Acts or McCain-Feingold Act

CHAPTER I- Why Super PACs?

The term “Super PAC” was officially coined by *National Journal* reporter Eliza Newlin Carney on June 26, 2010. Carney wanted to create a shorter expression for the “independent expenditure-only political action committees” she thought she would increasingly be writing about in what she described as a “post-Citizens United world” (Levinthal et al. 2012). Carney was undoubtedly correct that these independent expenditure-only political action committees would become incredibly popular. In the federal election cycles since 2010, Super PACs have been responsible for \$4,214,707,961 (“Political Action Committees” 2018) in campaign contributions. Such a large amount of money in contributions has clearly had an effect on federal campaigns and elections. Furthermore, no one knows where exactly all of these massive amounts of money originate from. Super PACs give donors the opportunity to contribute through incorporated entities which do not have to disclose their donors. Both the anonymity of donors and unlimited ceiling on funds of Super PACs have made them a crucial component of today’s elections.¹

¹ Super PACs only specifically affect campaigns for candidates for federal positions. This is because they were made legal through court decisions which all dealt with the FEC (Federal Elections Commission), which only regulates federal campaigns. Therefore, all campaigns and campaign finance rules discussed in this paper will deal specifically with campaigns for candidates running for federal positions, not state or local.

Early Campaign Finance Law

Campaign finance law in American elections can be traced all the way back to the days of George Washington himself. After losing an election for the Virginia House of Burgesses in 1755, two years later Washington purchased \$195 worth of punch and hard cider for friends and won. The legislature subsequently passed a law prohibiting “candidates or any persons on their behalf” from giving voters “money, meat, drink, entertainment or provision or ... any present, gift, reward or entertainment etc. in order to be elected” (Fuller, 2014). Congress itself passed its first law regulating campaign finance in 1867 through a naval appropriations bill which prohibited government officials from soliciting naval yard workers for money. Similarly, in 1883, the Pendleton Civil Service Act prohibited government officials from soliciting donations from any civil service workers.

The presidential election of 1904 brought campaign finance law and reform to national attention as it became a major component of President Theodore Roosevelt’s campaign. After fellow Republican William McKinley won the 1896 election after raising \$16 million and running a pro-business administration in favor of his donors, Roosevelt promised “to protect the integrity of the elections of its own officials [as] inherent” in government and called for “vigorous measures to eradicate” political corruption, as he noted there was “no enemy of free government more dangerous and none so insidious.” He also suggested that all contributions by corporations for any political purposes to be made illegal (Fuller, 2014). In 1907, Roosevelt’s wishes were legitimized with the passage of the Tillman Act, which made corporate contributions to federal candidates illegal but did not provide much in terms of enforcement. Through a

process of the passage of bills and Supreme Court cases deciding the legitimacy of those bills in the early 1900s, congressional candidates were required to report their finances and all contributions over \$100 on a quarterly basis. However, donors would set up multiple committees in order to donate different amounts all less than \$100 and bypass any reporting measures.

With the passage of the 17th Amendment in 1913, which provided for the direct election of senators, more federal elections meant more campaign money that needed to be regulated. In 1943, the Smith-Connally Act prohibited unions from donating to federal candidates, as banks and corporations already were prohibited from doing. In 1947, the passage of the Taft-Hartley Act banned corporations and unions from even making independent expenditure contributions in federal elections. “As long as candidates promised not to use their primary money during the general election campaign or collect private donations, they could campaign with publicly funded dollars” (Fuller, 2014). A major shift in federal campaign finance laws occurred in 1967, when, after nearly 50 years, Congress finally collected campaign finance reports. The modern era of campaign finance law had begun.

Modern History of Campaign Finance Law: Super PACs

Campaign finance law consistently evolves in modern America due to new legislation and landmark court cases. One of the most recent court cases which set a precedent in campaign finance laws by allowing and establishing the concept of Super PACs is *SpeechNow.org v. FEC*, decided on March 26, 2010 by the D.C. Circuit Court of Appeals. SpeechNOW is an unincorporated nonprofit organization which functions to make independent expenditures to openly advocate for or oppose candidates in federal

elections. SpeechNOW only accepts contributions from individuals and not corporations or unions. However, due to the Federal Election Campaign Act (FECA), if it spent or raised more than \$1,000 in a calendar year, SpeechNOW was limited in its contributions, must register as a political action committee, and must report all contributions as a registered PAC. On February 14, 2008, SpeechNOW officially filed a complaint to the D.C. District Court arguing that the conditions placed upon them as a political committee due to the FECA were unconstitutional. They said that the FECA restricts their First Amendment right to associate and limits individuals' freedom of speech by requiring them to register and limiting how much money they can contribute. Furthermore, SpeechNOW argued that the required reporting of a PAC was unconstitutionally burdensome ("Citizens United v. Federal Elections Commission" 2018).

The Court ruled that "the contribution limits of 2 U.S.C. §441a are unconstitutional as applied to individuals' contributions to SpeechNOW. The court also ruled that the reporting requirements of 2 U.S.C. §§432, 433 and 434(a) and the organizational requirements of 2 U.S.C. §431(4) and §431(8) can be constitutionally applied to SpeechNOW" ("Ongoing Litigation" 2018). The most important and precedent-setting part of this decision was the ruling that limits on political contributions violate the First Amendment when the government has no anti-corruption interest in limiting contributions. However, this distinction is limited to contributions to a group that only makes independent expenditures, such as SpeechNow.org, and does not apply to direct contributions to a political candidate.² Ultimately, the Super PAC was born, an

² Independent expenditures are defined by the FEC as "an expenditure for a campaign that: expressly advocates the election or defeat of a clearly identified federal candidate; and is not coordinated with a candidate, candidates' committee, party committee, or their agents." Furthermore, under FEC law, independent expenditures made by political committees "are not contributions and are not subject to contribution limits" ("Independent Expenditures", 2018).

independent expenditure-only political action committee that may accept unlimited donations from individuals, corporations, and trade unions.

Two months prior, on January 21, 2010, the Supreme Court ruled in *Citizens United v. FEC* (Federal Elections Commission) and helped pave the way for the SpeechNOW decision. Citizens United, a conservative nonprofit organization, had planned to run commercials for its film *Hillary: The Movie* and to provide it for free for Americans on video on demand (“Citizens United v. FEC (Supreme Court)”, 2018). However, the Bipartisan Campaign Reform Act of 2002 restricts what are known as “electioneering communications” in order to control big money contributions,³ and thus prevents corporations and labor unions from funding them from their general treasuries. It also requires the disclosure of donors to such electioneering communications and requires a disclaimer if the communication is not authorized by the political candidate. These restrictions would prevent Citizens United from their plans of releasing the film during an election cycle, so Citizens United filed an injunction against the FEC to prevent the BCRA from applying to *Hillary: The Movie*.

The District of Columbia Circuit Court denied the injunction on grounds that prohibiting corporations and labor unions from contributing to electioneering communications from their general treasury was already deemed constitutional in *McConnell v. FEC*, and that the film was “express advocacy” and therefore the other restrictions did not apply. Soon after, however, the Supreme Court noted probable jurisdiction in the case, and ruled 5-4 in favor of Citizens United. In a repeal of parts of

³ Colloquially, “big money contributions” are defined as any donation over \$200, which is the minimum donation amount that must be reported to the FEC. However, when candidates claim to be supported by small donations and not by big money, they may be alluding to the idea of not taking contributions in the surplus of thousands of dollars, or not taking contributions from large, big money, corporations.

both *Austin v. Chamber of Commerce*⁴ and *McConnell v. FEC.*, the Supreme Court ruled that “under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited” (“*Citizens United v. FEC* (Supreme Court)”, 2018). The majority opinion further explained that prohibiting corporate independent expenditures and electioneering communications is a prohibition on free political speech. Unlike the Circuit Court, the Supreme Court ruled that the FEC’s electioneering communications rules did apply to *Hillary: The Movie* and its advertisements, but that these disclaimer and disclosure guidelines did not burden any ability to free speech.

The rulings in *SpeechNow.org v. FEC* and *Citizens United v. FEC* together forbade any ceiling on election contributions for either independent expenditure only committees or electioneering communications. In order to understand the full weight of these decisions’ impacts on campaign finance law, it is important to understand the Federal Elections Campaign Act itself, which was partially repealed and challenged through these rulings.

⁴ The Michigan Campaign Finance Act prohibited corporations in the state from using their own treasury money for independent expenditures either opposing or supporting a candidate for state office. However, by setting up an independent fund solely for political purposes, a corporation could make independent expenditure donations. Because they wanted to use general funds to support a candidate for Michigan’s House of Representatives, the Michigan Chamber of Commerce opposed the act on the grounds that it was not a corporation and that the Michigan Campaign Finance Act violated the First and Fourteenth Amendments. On March 27, 1990, the Supreme Court upheld the Michigan Campaign Finance Act. The majority opinion states the act was “narrowly crafted and implemented to achieve the important goal of maintaining integrity in the political process.” Furthermore, it stated that the Michigan Chamber of Commerce was more like a business than a nonprofit organization given its activities, connections to business leaders, and large number of business corporation members (“*Austin v. Michigan Chamber of Commerce*”, 2019).

Federal Elections Campaign Act

Adopted in 1971, the FECA was created to regulate both the raising and spending of money in all United States federal elections. The FEC (Federal Elections Commission), the independent regulatory agency charged with governing federal campaign finance law, was not created until 1974 as an amendment to the FECA following Watergate⁵ in a stronger attempt to keep corruption out of federal campaigns and elections. The FECA created limitations on the amount of contributions that could be made to political candidates and their parties and mandated the disclosure of all contributions and expenditures in federal campaigns. Lastly, it completely prohibited corporate and union contributions, speech, and expenditures. Prior to *SpeechNow* and *Citizens United*, the FECA was significantly amended several times regarding contribution limits and donor disclosure requirements (“Legislation” 2018).

In January 1975, a coalition of plaintiffs, including Senator James Buckley of New York, alleged in District Court that the FECA’s contribution limits violated freedom of speech as guaranteed by the First Amendment. The District of Columbia District Court upheld the FECA, and the plaintiffs appealed to the Supreme Court. On January 30, 1976, the Supreme Court decided in *Buckley v. Valeo* that some of the contribution and expenditure limits of the amended FECA were unconstitutional. This case set a precedent by declaring that money raised or spent for a particular political candidate is a form of free speech and protected by the Constitution. Furthermore, it declared the importance of money in the modern federal campaigns which relied heavily on mass media. “Virtually

⁵ Although President Nixon signed into law some reforms to the FECA in 1972, his Watergate scandal included Nixon’s reelection committee funneling illegal corporate contributions into slush funds in order to pay for the infamous break-ins and to pay cash for other favors. After the Watergate hearings, the public was eager to see campaign finance further reformed which led to the 1974 amendments and creation of the FEC (“The Washington Post”, 2018).

every means of communicating ideas in today's mass society requires the expenditure of money...The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech" (Jones 2015). Specifically, *Buckley v. Valeo* struck down limits on campaign expenditures, limits on independent spending, and limits on expenditures of candidates' personal funds. However, it did uphold the FECA's limits on contributions, as the Supreme Court explained that the contributor was still free to spend independently and associate with political candidates in other ways.

Bipartisan Campaign Reform Act

Historically, pressure to create and enforce campaign finance laws has come from multiple areas both within and out of government. In 1989, the infamous Keating Five Scandal created more pressure which amounted to another significant change to campaign finance law. Charles H. Keating, Jr., banker and Chairman of the Lincoln Savings and Loan Association came under scrutiny when his bank faced an intensive, beyond regulatory investigation by the Federal Home Loan Bank Board. The bank collapsed in 1989, causing a \$3 billion loss to the federal government as well as wipeout losses to 23,000 plus bondholders and investors of the bank. When it was revealed that Mr. Keating had made more than \$1.3 million in campaign contributions to five U.S. senators, the Senate Ethics Committee began an investigation alleging those donations amounted to unethical pressure on the Federal Home Loan Bank Board on behalf of the Lincoln Savings and Loan Association. Five senators, California Democrat Alan Cranston, Arizona Democrat Dennis DeConcini, Ohio Democrat John Glenn, Arizona

Republican John McCain, and Michigan Democrat Donald W. Riegle, Jr., were all accused. Only three senators, Cranston, DeConcini, and Riegle, were found guilty of unethically interfering with the government to cause the Lincoln Savings and Loan Association to close before it imploded at a loss worse than it did. This scandal became known as the Keating Five, and although all senators implicated went on to continue their terms and some even continued long political careers, it became a symbol of corruption in the federal government and in campaign contributions (“What Was the Keating Five?” 2018). In particular, senator John McCain, although not formally found guilty, worked hard to remove what he called “my asterisk” on his political career by going on to create stricter campaign finance legislation (Nowicki, Dan, and Bill Muller 2018).

McCain’s biggest reform effort, another major change to the FECA, came in 2002 through the Bipartisan Campaign Reform Act, better known as BCRA or the McCain-Feingold Act. Although the FECA restricted campaign contributions for federal candidates, state campaign finance laws differed by allowing large and often unlimited contributions by both corporations and unions. These contributions, known as soft money,⁶ were often funneled to federal candidates or political parties, bypassing the rules and regulations of the FECA. The BCRA was created in an attempt to close these loopholes and ban so called soft money. Passed by Congress on March 27, 2002, the BCRA raised the limit on contributions by individuals and banned federal candidates or their parties from soliciting, receiving, or directing money from any person or organization not following the FECA guidelines. The BCRA also prohibited the use of

⁶ “Soft money” is money donated to political parties that is not regulated by the FEC. This money comes from corporations, unions, and individuals who can donate an unlimited amount of money, because their donations are made in support of the entire party rather than of a specific candidate, thus not justifying campaign finance laws. “Hard money”, on the other hand, is money that is donated to candidates that is regulated by the FEC because it is donations made specifically to support certain candidates.

electioneering communications by corporations or trade unions, which was later overruled in *Citizens United v. FEC* (Jones 2018). Two of the principal restrictions of the BCRA, controlling and limiting soft money and regulating electioneering communications, were upheld by the Supreme Court in *McConnell v. FEC* on December 10, 2003 (“McConnell” 2018).

Introduction of Super PACs: Size and Donor Anonymity

The evolution of campaign finance laws in modern America is evident in the court case decisions, both upper and lower, and the federal legislation that guides it. These changes have had major effects on how federal campaigns are funded and conducted and have thus arguably had effects on the results of federal elections. One of the most recent major changes to how campaigns can be funded is the birth and introduction of the Super PAC, an unlimited independent expenditure only political action committee. Super PACs have the ability to raise an unlimited amount of funds from undisclosed donors in order to support political candidates and campaigns in certain regulated ways, as long as they have no direct contact with the candidate themselves. The size and anonymity of Super PACs have made them a powerful force in recent federal election campaigns and are thus an important component to analyze when studying campaign finance laws and their effects on elections.

In the first federal election campaign cycle in which Super PACs were permitted, 2012, Super PAC contributions made up 47.13% of total outside spending or independent expenditures. In the most recent completed cycle, 2016, Super PAC spending made up 62.51% of outside spending. This represents a significant increase in outside expenditures due to the introduced legality of Super PACs, as in the 2010 cycle, Super PAC spending

made up 0% of outside spending in federal campaigns (“Expenditures” 2018). To go from having no part in the campaign process, before the *SpeechNow v. FEC* decision, to amounting to more than half of its total independent expenditures, it is clear that Super PACs have had an increased influence on federal campaigns. Because Super PAC contributions and spending are unlimited, their size and relevance is only likely to continue to grow.

Even more so than making up a greater percentage of outside spending, Super PACs have greatly increased the overall amount of outside spending in federal elections. Between 2010 and 2012 alone, the first cycle which allowed for Super PAC spending, total independent expenditures increased by 20.5%, from just over \$200 million in 2010 to over \$1 billion in 2012. Total outside spending had been increasing steadily before, with the exception of more always being spent in presidential election years than the cycle following, but the introduction of Super PACs caused an unprecedented increase in independent expenditures. As independent expenditures amounted to just over \$5 million in 1990 but have amounted to over \$1 billion each federal election cycle since the legality of Super PACs (except 2014), it is evident the immense change Super PACs have had on election spending (“Total Outside Spending by Election Cycle...”, 2018). These unparalleled increases in outside spending also emphasize the size of Super PACs themselves. In order to have such an impact on the increase of overall independent expenditures, Super PACs must be big enough in and of themselves.

Beyond the size of Super PACs, the aspect of their anonymity also makes them a major influence in federal election campaigns. Super PACs must report their donors, the date of the donation, and the amount of the donation to the FEC. However, commonly, individual donors make contributions through other organized groups to Super PACs,

thus bypassing having their own name disclosed as a donor to the Super PAC. Another way donors have found a loophole to remain anonymous in their campaign contributions is by their Super PAC waiting until after an election to report their donors. For example, the Super PAC Red and Gold spent \$1 million in 2018 attacking Representative Martha McSally in Arizona. However, they informed the FEC that they would not file their monthly reports, which would disclose their donors, until September 20, which was more than three weeks after McSally's Republican primary. While Red and Gold's donor records eventually were released to the public, the names of those donors could not have had an effect on voters, as it came after election day. "Overall, at least two dozen super PACs that spent millions of dollars in recent elections used loopholes to get out of revealing their donors, according to information compiled by the Campaign Legal Center, a watchdog organization" (Severns et al. 2018). While loopholes like the late filing by Red and Gold are not incredibly common in campaigns, once Super PACs observe others participating in them without any repercussions, they will likely follow suit, opening up the possibility for more Super PACs bypassing campaign finance laws (Severns et al. 2018).

Does Anonymity Matter?

The term "dark money" has often been used to describe spending by political nonprofits. Since political nonprofits have no legal obligation to disclose their donors, their contributors typically remain anonymous. The anonymity of the donors makes their donations what is called dark money, since the public has no knowledge of its source. With the introduced legality of the Super PAC, however, dark money can also be used to describe some aspects of Super PAC donations. Although Super PACs are required to report their donors, donors can contribute through "shell" organizations such as political

nonprofits themselves or corporations, therefore making their donations dark money. Super PACs are only required to report to the FEC the donors whom have contributed \$200 or more. However, the name they report can be that of an organization, so the individual who contributed more than \$200 to that organization, and therefore the Super PAC, can essentially avoid the disclosure requirement. In this sense, Super PACs have, for the first time in the history of campaign finance laws, made it possible for individuals, corporations, and unions to donate an unlimited amount of dark money to a candidate's independent expenditures.

The debate over whether the identity of donors to political campaigns should remain anonymous or should be disclosed to the public finds credence on both sides, which are both focused on the potential for corruption. This issue has recently gained more attention and debate in the scheme of the long history of the creation and reform of campaign finance laws. Supporters of anonymity for donors claim that if politicians did not know who financially supported their campaign, they would not try to repay them with policy or political favors once they were elected. A major critique of the corruption and unethical acts of politicians is that they make decisions once in office that benefit the donors who helped them get into office. On the other hand, supporters of transparency for donors claim that it holds the elected officials accountable to the electorate, as they are able to know exactly which and what kind of people or organizations are funding the candidate. The supporters believe this inhibits potential for corruption on behalf of the politician, as they will not attempt to use their elected office to benefit their donors if the public serves as a watchdog by knowing the identities of the donors.

Both supporters and opponents of anonymity for campaign donors often ground their arguments in the Constitution. Advocates of anonymity for donors argue that the

First Amendment right to join together for political means is inhibited because of intimidation when a list of a certain political group's members is made public. These proponents often cite the 1958 Supreme Court decision which kept the names of the members of the NAACP anonymous from the state of Alabama. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association" (Denniston, 2012). Although this decision does not pertain directly to campaign finance law, proponents explain that it is still a precedent set by the court which maintains disclosure of names of members of a political group inhibits the individuals of that group's freedom of association. However, supporters of disclosure or transparency for campaign contributors claim that the First Amendment actually provides for a right for Americans to know who is attempting to influence their elections. Anonymity opponents contend this has also been established by the Supreme Court. In 2010, the ruling in *Doe v. Reed* upheld the public disclosure of individuals whom had signed a ballot measure initiative. Justice Scalia noted in the decision, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed" (Denniston, 2012). In this argument, a democracy cannot ensue without those influencing politics being named publicly.

Regarding Super PACs specifically, it is evident in the data of independent expenditures, both before and after their legality, that the introduction of anonymous donors spurred more political involvement. Contributions for outside spending increased dramatically with the introduction of Super PACs, signaling that these donors were more willing to contribute when their identities could remain anonymous. This supports the argument of many proponents of donor anonymity who claim that anonymity protects donors whom would otherwise be too intimidated to donate if their donations were

forcibly and publicly disclosed. In the absence of disclosure, these donors contribute more to political campaigns. Reasons for this could stem from both the donor and the candidate themselves. If the donor was wanting to protect his or her own name or interests from being associated with a specific political campaign, Super PACs allow them to donate and still remain anonymous. If a political candidate is worried about the electorate thinking negatively about their campaign due to a certain contributor, the campaign may be more encouraged to solicit donations from controversial individuals or corporations without concern for public backlash.

But how do these aspects of anonymity affect a democracy? If a donor is trying to protect his or her name or interests from being associated with a political candidate's, what does that say about the legitimacy of that candidate in running for public office? And if a candidate wants to keep the public from knowing that a controversial candidate or corporation is supporting their campaign, what does that say about the ethics of that candidate and about the potential for corruption if they were elected? These questions are at the core of the debate over the legal anonymity of donors to Super PACs. They represent an intersection between ethics and democracy and increased participation in political campaigns. The question ultimately comes down to whether it is reasonable and constitutional to sacrifice public knowledge of contributors in order to retain donor privacy and increased political involvement. Does the anonymity or public transparency of political campaign donors actually matter to a democracy?

Independent Expenditures

Super PACS act as independent expenditure only political action committees, meaning that they are only allowed to participate in independent expenditures as they

relate to federal candidates and campaigns. In order to understand the purpose of Super PACs and how they function, it is essential to understand exactly what constitutes an independent expenditure. According to the FEC's legislation, independent expenditures are defined as "an expenditure for a campaign that: expressly advocates the election or defeat of a clearly identified federal candidate; and is not coordinated with a candidate, candidates' committee, party committee, or their agents" ("Independent Expenditures", 2018). Therefore, the type of actions Super PACs may partake in in campaigns is highly regulated. The most important and limiting aspect of this regulation is that Super PACs can have no coordination with a candidate, their campaign team, or their political party. This is one major way Super PACs are set apart from other forms of political action committees and sources of campaign finance. Super PACs act solely on their own and are therefore not explicitly an asset to a certain candidate. They have the liberty to choose whichever candidates they want to support or oppose in any given election but owe no certain amount of money or loyalty to those candidates as they are prohibited from any formal communication with them or their teams.

The reason Super PACs are unlimited in terms of money spent on independent expenditures is because they are prohibited from coordinating with the candidates and their campaign teams. This restriction on communication is what prompted the Supreme Court to rule that independent expenditures hold no possibility for corruption and therefore should not be limited in terms of what they can spend ("Ongoing Litigation", 2018). Because they cannot communicate directly with the official campaign, they are not seen as an actual part of the campaign. Therefore, no corruption can inevitably take place, as the Super PAC cannot corrupt a campaign in which it plays no official part. However, Super PACs are required to disclose the name of their organization on any independent

expenditure they fund. In the legal terms of the FECA, “a communication representing an independent expenditure must display a disclaimer notice” (“Understanding Independent Expenditures”, 2018). This opens the opportunity for Super PACs to participate in independent expenditures, or what is often referred to as open spending for a candidate, in an unlimited form.

Independent expenditures by Super PACs are made in a variety of ways, but the most common are TV advertisements, radio advertisements, and direct mailing. Without any coordination with the actual campaign, a Super PAC may air a TV commercial either endorsing or attacking a certain candidate in an election. The candidate and his or her campaign team would not even know that the ad was being aired, let alone the content of that ad, until they actually saw it for themselves on TV. This can stir controversy between a candidate and his or her campaign team and the Super PAC. Even if a Super PAC aired a TV commercial supporting a candidate, it may not follow the media strategy the candidate’s team had planned and approved for themselves. However, because of the communication restriction between the Super PAC and the candidate, there is no way for them to communicate this to the Super PAC and approve it before it airs or ask for it to be taken down or edited.

CHAPTER II- CITIZENS UNITED V FEC

As previously explained, the Supreme Court ruling in *Citizens United v Federal Election Commission* on January 21, 2010 paved the way for the formation of Super PACs. By ruling that unlimited corporate independent expenditures and electioneering communications are constitutional as a form of freedom of speech, the Court's decision legalized an integral aspect of Super PACs. The case was brought before the Supreme Court by Citizens United, a nonprofit organization, which had planned to run commercials for its film *Hillary: The Movie* and provide it for all viewers on video on demand. However, according to §441b of the FECA⁷, this would be a felony on behalf of Citizens United for funding electioneering communications from a corporate treasury within 30 days of a federal election. Citizens United questioned the constitutionality of this law, claiming it diminishes their First Amendment right to freedom of speech as a group. Ultimately, the case became a question over whether the decisions made by the Court in *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC* were still valid and should be applied to Citizens United. In fact, after the original trial, the Court moved the decision back to the next term and asked both the plaintiff and defendant to file briefs specifically arguing for or against Austin and McConnell based on the current

⁷ §441b of the FECA states that it is unlawful for corporations to make contributions or expenditures to any political candidate or campaign.

case. These briefs, and the questioning of Austin itself, are the most important for understanding what led to the creation of Super PACs.

Argument of the Plaintiff

Citizens United argued that both the decisions in *McConnell v. FEC* and *Austin v. Michigan Chamber of Commerce* must be overruled in order to fully protect the First Amendment and their position in the case. They focus their argument on the repeal of *Austin*, as they state that the McConnell decision would never have been made without the precedent of *Austin*. “*Austin* was wrong when it was decided, and this Court’s subsequent decisions have further undermined its First Amendment analysis,” (558 U.S. 310). While Citizens United argued for the repeal of *Austin* in order to have the current case ruled in their favor, they made it clear that this was not simply about victory for themselves. They claimed that all current framework for regulating corporations’ political speech is invalid because it is based on *Austin*.

Citizens United disputes the ruling in *Austin v. Michigan Chamber of Commerce* by regarding its rationale as flawed. The Court ruled in *Austin* that corporation’s “immense aggregations of wealth” potentially held a “corrosive and distorting effect” on politics and elections. Citizens United claims that this reasoning means that some speakers’ political speech must be suppressed if it were to have the same “effect” considered distorting by the Court. However, they explain that the government has no interest in equalizing political voices. Furthermore, Citizens United argues that the Constitution does not specifically give fewer rights to corporations than to individuals and that “shareholders do not need the protection against using corporation funds to pay

for political messages because ‘corporate democracy’ affords sufficient protection,” (558 U.S. 310). Citizens United also addresses the idea that the Court should respect the precedent set by *Austin* under the theory of *stare decisis*⁸ but argues that many justices have already criticized the decision and argued for its overruling, diminishing any sound reliance on the precedent.

Later, in a brief filed as a response to the FEC, Citizens United argued that the government was forsaking the original reasoning behind the *Austin* decision and relying on defending rationales which were never considered during *Austin v. Michigan Chamber of Commerce*, preventing corruption and protecting stockholders. Furthermore, they argued that neither of these rationales are applicable to Citizens United, which did not corrupt anyone and clearly did not have any stockholders to protect. They claimed that the FEC had given up its challenge on the film in order to defend two prior decisions, *Austin* and *McConnell*, which Citizens United argued the FEC would use “to suppress political speech another day” (558 U.S. 310).

Argument of the Defendant

The Federal Elections Commission, or FEC, served as the defendant in the case, arguing for the illegality of Citizens United’s attempts to air *Hilary: The Movie*. The FEC argued this case with Citizens United was not a proper one to reexamine *Austin* or *McConnell* because of “idiosyncratic features” which made it “particularly unsuitable” to

⁸ *Stare decisis* is the doctrine of precedent in law. Courts can cite *stare decisis* when an issue, similar to the current case, has been brought to the court prior and a ruling was made. According to the Supreme Court, *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” By deferring to previous decisions, *stare decisis* keeps the Court from having to continuously evaluate legal underpinnings of past decisions and doctrines (LII Staff, 2017).

answer such a large Constitutional question. The FEC claimed that the question is mostly about for-profit corporations and businesses, and because Citizens United is a non-profit advocacy corporation, any decision should not be made based upon it. They stated that the Court should wait for a similar case to be brought forward by a for-profit corporation in order to redecide *Austin* and or *McConnell*. Essentially, the FEC was seemingly suggesting a pass for Citizens United in the case of *Hilary: The Movie* due to its status as a non-profit corporation.⁹

The FEC then focused its attention to the potential for corruption in its defense of the two precedents. The Solicitor General cautioned the Court that they would be discarding “decades of federal legislation” if they were to repeal either previous decision. Claiming that the *Austin* decision should not be treated as an aberration, the FEC furthered that repealing *Austin* would lead to corporate treasuries engaging in “actual corruption” of elections and politics. The FEC continually argued against the reexamination based on the potential corruption from for-profit businesses due to their “vast sums” of spending on politics. “The nature of business corporations,” the brief said, “makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption.” Even if this reasoning could not directly be applied to Citizens United, the FEC still argued that the *Austin* and *McConnell* decisions were still sound and should not be reexamined.

⁹ The legal distinction between a non-profit advocacy group, such as Citizens United, and a for-profit enterprise is important in understanding the arguments and the Court’s decision. While a for-profit enterprise’s “primary mission is to generate profit,” non-profit advocacy groups do not prioritize profit but rather are dedicated to promoting a cause or advocating for a particular standpoint (“7 Key Differences...”, 2019). This distinction matters further in campaign finance, as in terms of the potential for corruption, which is what both the Court and FEC are concerned with, a for-profit enterprise has much greater potential. Because its main goal is making a profit, this produces incentive for corruption by donating to a campaign and seeking monetary or other political favors from the candidate. While arguably non-profit advocacy groups also hold some potential for corruption, as they also could seek political favors after a contribution, there is seemingly less potential since their mission is not driven by money.

In a separate reply brief to Citizens United arguments, the FEC furthered their argument that Citizens United had already forfeited its claims to a Constitutional challenge. They also argued more firmly against for-profit corporation political spending, repeatedly citing its potential for corruption in the political system. Lastly, the brief questioned Citizens United for trying to overrule Court decisions which did not necessarily apply to them when they could more easily win the case on narrower grounds, once again signaling the FEC's objective of maintaining the *Austin* and *McConnell* decisions (558 U.S. 310).

Majority Opinion

Justice Kennedy delivered the majority opinion in which he reasoned for allowing unlimited independent expenditures by corporations. This was accomplished through overruling *Austin v Michigan Chamber of Commerce* in 1990. He explained that §441b of the FECA was only ever made legal because of the *Austin* ruling. However, he further noted that the rationale in the *Austin* decision was unconstitutional and did not follow the First Amendment precedents that had been set by the Court prior.¹⁰ It was the opinion of the Court that, “We agree with that conclusion and hold that stare decisis does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether” (558 U.S. 310, p. 1-2). An overrule of *Austin* deemed §441b of the FECA unconstitutional. Because the ruling in *McConnell* was largely based off the ruling

¹⁰ *Lebron v. National Railroad Passenger Corporation*

in *Austin*, the Court's decision also overruled portions of *McConnell v Federal Election Commission* upholding limits on electioneering communications.

Before determining whether *Austin* should be overruled, Justice Kennedy first questions whether the application of §441b could be applied to Citizens United on narrower grounds. Citizens United claimed that it was inapplicable to *Hillary: The Movie* because the movie does not qualify as electioneering communications or as express advocacy because it is shown through video on demand, and therefore has a lower chance of distorting politics than a television ad. They also claim it does not meet the criteria since Citizens United is mostly funded by individuals. However, the Court cites reasoning against these claims by Citizens United, instead asserting that they are all narrow claims which are not plausible for the application of §441b in the future. "We decline to adopt an interpretation that requires intricate case-by-case interpretations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject" (558 U.S. 310, p. 12).

Although the Court finds reason to disprove each of Citizens United's original claims for not applying §441b to *Hillary: The Movie*, they do so largely in part to avoid their narrow scopes. They did not want to make a ruling which would set a precedent for similar cases to have to go through tedious individual court cases if they could make a broader ruling determining the ultimate constitutionality of §441b and the decision in *Austin* which allowed for the establishment of §441b. "Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in

Austin” (558 U.S. 310, p. 12). The Court deems it their responsibility as an institution to investigate the reasoning behind the statute thoroughly in order to make a broad ruling.

Furthermore, Justice Kennedy explains that, “the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment” (558 U.S. 310, p. 12). This conclusion leads the court into questioning the facial validity of §441b itself. While the appellate court had ruled that Citizens United had waived its right to challenge *Austin* by dismissing count 5, the facial challenge to §441b, the Supreme Court disagreed. They argue that even if Citizens United could waive the facial challenge while preserving the as-applied challenge, it would not in any way prevent the Court from still reconsidering *Austin* or §441b’s facial validity. Next, the Court accepts Citizen’s United claim that the FEC has violated its First Amendment right to free speech, which the Court explains is not a new claim. They also argue for the review of §441b due to the lack of distinction between facial and as-applied challenges. “Citizens United has preserved its First Amendment challenge to §441b as applied to the facts of the case; and given all the circumstances, we cannot easily address that issue without assuming a premise- the permissibility of restricting corporate political speech- that is itself in doubt” (558 U.S. 310, p. 14). Once again, this time through the explanation of why this case allows for the questioning of the facial validity of §441b, the Court asserts that this case is ultimately about the constitutionality of limiting or restricting corporations’ rights to free speech.

Justice Kennedy gives one more line of reasoning for the challenge of the facial validity of §441b based on this case. “Any other course of decision would prolong the substantial, nation-wide chilling effect caused by §441b’s prohibitions on corporate expenditures” (558 U.S. 310, p. 16). He explains the uncertainty of the clause on behalf

of the Government in their interpretation of what constitutes both a nonprofit organization and an applicable form of media and in turn argues that not deciding the facial validity of §441b would further this uncertainty. Next, he argues that the timeliness of political speech makes a case-by-case application of the principle ineffective. “There are short time frames in which speech can have influence,” (558 U.S. 310, p. 17).

Inevitably, Citizens United lost its time frame for political speech, as the case was being decided nearly two years after the presidential primary nomination it was seeking to influence. To question §441b as-applied would mean the window for influencing politics would already be closed by the time the decision was made, even if it was decided to allow the corporation to participate. Lastly, returning to what the Court cites as the main issue in this decision, Justice Kennedy explains that the importance of speech to election integrity makes the facial validity decision crucial. He goes on to explain the complexity and length of FEC legislation in all of its regulations, justifications, and exceptions.

Justice Kennedy uses this to assert that any limits on speech interfere with the integrity of elections and with a free marketplace of ideas. He even refers to the FEC as a “regime” which is what he mandates “an unprecedented governmental intervention in the realm of speech” (558 U.S. 310, p. 19). This conclusion and the support for why this case renders the consideration of the facial validity of §441b both constitute the need to invoke earlier precedents set by the Court, which overrule any statute that chills speech.

After establishing that the validity of §441b must be considered by the Court, Justice Kennedy begins the reasoning behind the Court’s decision of its validity. By giving examples of situations which are considered felonies under this section yet are simply corporations expressing their views publicly, he works to reason why the ban on corporate independent expenditures for express advocacy is a ban itself on freedom of

speech. He also considers PACs,¹¹ citing the costly and weighty restrictions on both establishing and running them. While he admits that PACs allow for the funding of such action as Citizens United is attempting to take, he deems them an ineffective means of doing so. Furthermore, he established that a PAC does not actually allow for a corporation to speak through it, making them irrelevant to the discussion of their impact on freedom of speech. Because PACs do not alleviate the First Amendment burden put upon corporations by §441b, the Court determined that, “Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech” (558 U.S. 310, p. 22).

Dissenting Opinion

Justice Stevens delivered the dissenting opinion, which was concurring in part and dissenting in part. Justices Ginsburg, Breyer, and Sotomayor concurred with Justice Stevens. Justice Stevens began the dissent by making it clear that this case is not about how Citizens United can finance their electioneering communications, but rather about if the First Amendment can affirmatively answer how Citizens United can do so. Furthermore, the idea that for-profit entities’ campaign finance law can be rewritten based off this case is “misguided.” Justice Stevens calls the “glittering generality” that the First Amendment calls for free speech for corporations as it does for individuals an incorrect statement of law. “The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case” (558 U.S. 310). He furthers that the Court’s decision

¹¹ Super PACs were not in existence at the time of the decisions, thus making them irrelevant to this reasoning.

in way of handling corporate electioneering is a break from a century of history which has distinguished between individual contributions and corporate campaign spending.¹² Ultimately, the dissent agrees with the Court's decision to uphold BCRA's disclosure provisions but disagrees with its principal holding.

The dissent outlines why it believes the Court never should have decided whether to overrule *Austin* and portions of *McConnell*. Firstly, the Court asked the plaintiff and defendant whether *Austin* should be overruled rather than the questions of the case directly asking the Court, which is "unusual and inadvisable" for a court. The dissent claims that this review of *Austin* based on *Citizens United* was the work of five judges unhappy with the limited nature of the case. Next, the Court has historically considered facial challenges to be disfavored,¹³ yet they declared §203 facially unconstitutional, thereby turning an as-applied challenge into a facial challenge. One of the major grounds the majority opinion and Court stands on to require the review of *Austin* is that anything less or narrower would chill corporate speech. However, the dissent claims this "desertion is unsubstantiated" as there is no record for a significant number of corporations to have been chilled by FEC oversight.

Furthermore, the dissent critiques the Court's overlook of *stare decisis*. "I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine" (558 U.S. 310). Justice Stevens claims that the Court only wanted to bypass *stare decisis* because of personal preference. He notes that the

¹² *FEC v. Wisconsin Right to Life, Inc.*; *McConnell v. FEC*; *FEC v. Beaumont*; *FEC v. Massachusetts Citizens for Life, Inc.*; *California Medical Assn. v. FEC*

¹³ *Washington State Grange v. Washington State Republican Party*; *Ayotte v. Planned Parenthood of Northern New Eng.*

Austin decision has been on the book for two decades, while *McConnell* is only six years old, and the only thing that has changed since that decision is the makeup of the Court.

Next, the dissent outlines three disagreements it has with core premises the Court's decision relied on. First, they disagree that there is any total ban on corporate speech. They embolden the multitude of additional avenues open for speech apart from some restrictions. Secondly, they disagree with the premise that the government cannot restrict political speech based on the speaker's identity. While the majority rests this premise on *First National Bank of Boston v. Bellotti*, the dissent argues that this is a misunderstanding of that case, claiming that it was a much narrower ruling. The dissent furthers that the government can restrict political speech based on identity when that identity is understood in categorical or institutional terms. For example, the government limits the rights of speech by students, prisoners, members of the Armed Forces, foreigners, and its own employees. Lastly, the dissent disagrees with the majority's premise that the *Austin* and *McConnell* decisions were radical outliers of the First Amendment tradition. In contrast, the dissent views the *Citizens United* decision as a radical departure from First Amendment law. Furthermore, the dissent questions the rationales of anticorruption, anti-distortion, and shareholder protection rationales which the majority bases its ruling on. They argue that the anti-distortion rationale of *Austin* is itself an anticorruption rationale.

CHAPTER III- SPEECHNOW.ORG V FEC

While the ruling in *Citizens United v FEC* laid the foundation for Super PACs, they were formally created through the ruling of *SpeechNOW.org v FEC*, a case tried in the D.C. Circuit in 2010, just two months after the *Citizens United* decision. It was the first court case in which the decision in *Citizens United*, which removed contribution limits from independent expenditures, was applied. SpeechNOW is a nonprofit organization made up of individuals whom pool their resources to support candidates in elections through independent expenditures and with express advocacy. While SpeechNOW only accepts donations from individuals, and not corporations, under the FECA, they were required to register as a political committee upon raising \$1,000 and also faced contribution limits. On February 14, 2008 (prior to the *Citizens United* decision), SpeechNOW and other individual plaintiffs¹⁴ filed a suit in the United States District Court for the District of Columbia which challenged these registration and disclosure requirements and contribution limitations by the FEC. The District Court then denied the request for a preliminary injunction, “holding that sufficiently important

¹⁴ David Keating, Fred M. Young, Jr., Edward H. Crane III, Brad Russo, and Scott Burkhard. David Keating being both the president and treasurer of SpeechNOW.

government interests support limits on contributions to political committees, including groups like SpeechNOW who intend to spend all of their money on independent expenditures." However, the plaintiffs then appealed the case to the United States Court of Appeals for the District of Columbia, which made a ruling post- *Citizens United* ("SpeechNOW.org v. Federal Election Commission.", 2019).

Argument of the Plaintiff

The plaintiff, SpeechNOW, immediately links this case to the *Citizens United* decision by beginning the appeal with a reference to and application of the decision. "In *Citizens United v. FEC*, this Court held that the government cannot require a corporation to speak through a political committee or 'PAC' as an alternative to banning the corporation's speech outright. In direct conflict with that holding, the D.C. Circuit held that SpeechNow.org - an unincorporated group that makes only independent expenditures and thus poses no risk of corruption or its appearance - must organize as a political committee in order to speak" (No. 08-5223, p. i). In acknowledging *Citizens United* as its grounds for appeal, SpeechNOW further mimics the language used by the majority in *Citizens United* as it summarizes what it sees as the root of the case. "The question presented is whether, under the Free Speech Clause of the First Amendment, the federal government may require an unincorporated association that makes only independent expenditures to register and report as a political committee despite the fact that a more narrowly tailored means of disclosing its independent expenditures exists in 2 U.S.C. § 434(c)" (No. 08-5223, p. i). If the Court had just ruled that "burdensome PAC requirements" did not hold for corporations, then SpeechNOW believed the same should be applicable for them, regardless of their unincorporated status.

First, SpeechNOW argues that the D.C. Circuit Court’s decision conflicts with the Supreme Court’s in *Citizens United* in that a group of citizens must associate as a PAC in order to make unlimited independent expenditures. Citing a majority opinion quote from *Citizens United* and other court cases,¹⁵ they argue that the Court has historically recognized the burdens PACs impose on those that spend money as a form of speech. In *Citizens United*, these burdens led the Court to decide that the independent expenditure restrictions were a violation of free speech. SpeechNOW argues that the same logic should be applied to them because while the restrictions and statutory provisions are not the same for *Citizens United* and SpeechNOW, the results are the same. “SpeechNow.org is prohibited from making unlimited independent expenditures unless it becomes a PAC” (No. 08-5223, p. 15). They use this reasoning to argue that the results of registering and maintaining the status of a PAC are as burdensome as the limitations on *Citizens United*, as thus should also be considered a violation of the right to free speech.

Next, SpeechNOW argues that the D.C. Circuit failed to apply strict scrutiny¹⁶ to the requirements of PACs and thus misapplied immediate scrutiny.¹⁷ The majority opinion in *Citizens United* quoted *FEC v Wisconsin Right to Life, Inc.* in that it is a First Amendment law that, “laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest’” (No. 08-5223, p. 21).

SpeechNOW utilizes this same reasoning in order to assert that SpeechNOW’s

¹⁵ *FEC v Massachusetts Citizens for Life, Inc.*; *FEC v Wisconsin Right to Life, Inc.*

¹⁶ Strict scrutiny is a form of judicial review in which courts determine the constitutionality of laws. In order to pass strict scrutiny, the legislature must have passed the law to further a “compelling government interest” and have thus narrowly tailored the law to achieve that interest. Strict scrutiny is the highest standard of review to evaluate constitutionality (Strasser, 2018).

¹⁷ Immediate scrutiny is another form of judicial review in which courts determine the constitutionality of laws. It is invoked when a statute negatively affects protected classes. In order to pass immediate scrutiny, the law must further an important government interest and do so by means substantially related to that interest. It is therefore less rigorous than strict scrutiny (Hashmall, 2017).

independent expenditures hold no threat for corruption, and thus SpeechNOW's PAC requirements should be overthrown as the requirements upon Citizens United were. The plaintiff's argument relies on this direct correlation between SpeechNOW and Citizens United as entities, explaining, "this case is therefore on all fours with *Citizens United* and the outcome should be the same" (No. 08-5223, p. 21). By choosing to address PAC requirements as they applied to SpeechNOW and treat them as minor disclosure requirements rather than "inherently burdensome speech restrictions", SpeechNOW argues that the D.C. Circuit Court failed to apply strict scrutiny to the PAC requirements and furthermore failed to apply immediate scrutiny. "Both *Davis* and *Citizens United* support the principle that disclosure laws must be narrowly tailored to fit their legitimate ends... Moreover, everything the D.C. Circuit claimed as a justification for requiring SpeechNow.org to become a PAC- for example, that SpeechNow.org could allegedly avoid reporting contributions made exclusively for administrative expenses and that requiring SpeechNow.org to become a PAC would facilitate the detection of violations of other laws - could just as easily be said about Citizens United or any *MCFL* group. Yet in both cases, this Court refused to require such groups to become PACs" (No. 08-5223, p. 24). SpeechNOW furthers that the same could be said regarding strict and immediate scrutiny to *Buckley* and *McConnell*.

SpeechNOW next argues that the case raises issues of national significance about the scope of regulations groups making independent expenditures should face. They argue that the D.C. Circuit disregarded the importance of political speech which results in unincorporated associations like SpeechNOW facing greater burdens in making independent expenditures than corporations or unions do. "*Citizens United* stands not only for the proposition that the government may not ban certain speakers from making

independent expenditures, but also that it may not so burden independent political speech that speakers will avoid the effort altogether” (No. 08-5223, p. 26). Following the same language in the *Citizens United* decision that corporations’ political speech would be chilled, SpeechNOW argues that the independent speech of groups like their own will also be chilled by having to register as and meet the restrictions of a PAC.

SpeechNOW concludes its argument by claiming that its case allows the court to finally clarify the scope and application of the “Major Purpose” test. The “Major Purpose” test comes from the FEC, in which they allow groups to become PACs as long as their “major purpose” is “federal campaign activity.” While SpeechNOW agrees that making independent expenditures is their major purpose, they dispute the idea that it justifies their requirement to register as a PAC. Since corporations and unions are allowed unlimited independent expenditures without registering as PACs under the *Citizens United* ruling, SpeechNOW argues that the government cannot justify it having to do so. They argue that a threat of corruption- which SpeechNOW does not hold- is a better interpretation of the “Major Purpose” test, which determines whether a group must register as a PAC in order to speak. With the introduction of unlimited political speech by corporations and unions, SpeechNOW questions whether corporations and unions could pass the “Major Purpose” test and should therefore be required to register as PACs. “Resolving the question presented in this case in SpeechNow.org’s favor would bring clarity to the law and would preserve free speech by making clear that *only* groups whose activities pose a threat of corruption need register as PACs” (No. 08-5223, p. 31). In conclusion, SpeechNOW reiterates that the court has the opportunity to clarify for groups such as itself that they do not have to undergo the burdensome process of registering as a PAC and maintaining the regulations of one in order to speak.

Argument of the Defendant

In opposition, the Federal Elections Commission asserts that the Court of Appeals correctly rejected SpeechNOW's as-applied challenge to the FECA. They also assert that this decision did not conflict with any other court's decision, signaling they clearly do not agree with SpeechNOW's core assumption that they should be treated in the same respect as *Citizens United*. The FEC points out that unlike *Citizens United* prior to its ruling, SpeechNOW is already permitted to spend unlimited amounts on independent expenditures, granted they register and comply with PAC requirements. They argue that the question raised by SpeechNOW's case is not whether there should be different PAC or disclosure requirements for corporate and unincorporated entities, but rather whether the Constitution permits PAC registration, compliance, and disclosure requirements of all entities.

The FEC rejects SpeechNOW's claims that the court failed to apply strict or immediate scrutiny. They argue that the court applied the same scrutiny that it has used in the past, from *Buckley* to *Citizens United*. "Because the FECA provisions that petitioners challenge in this Court do not limit SpeechNow's ability to raise or spend funds to speak as it sees fit, but require only that SpeechNow disclose the origins and destination of those funds (and take accompanying administrative steps), the court of appeals properly applied this Court's intermediate 'exacting scrutiny' standard rather than the strict scrutiny applicable to speech prohibitions" (No. 08-5223, p. 11). They further that strict scrutiny never should have been applied in this case, as the disclosure requirements in this case are not comparable to the spending limits in *Citizens United*. Unlike SpeechNOW, which argued that PAC requirements are burdensome to free speech, the FEC asserts that requiring SpeechNOW to register as a PAC does not inhibit its ability to

participate in campaign advocacy. The FEC even remarks that David Keating, as the treasurer of SpeechNOW, is fully capable of handling the responsibilities of reporting due to his history of political activism and support for other PACs. “As the court of appeals concluded, the organizational requirements that petitioners challenge, such as designating a treasurer and retaining records, do not ‘impose much of an additional burden upon SpeechNow,’ especially given the relative simplicity with which SpeechNow intends to operate” (No. 08-5223, p. 20).

Although SpeechNOW did not object to the disclosure requirements of a PAC, if they were required to register as one, the FEC includes a thorough argument in support of these requirements in its defense.¹⁸ First, the disclosure requirements inform the electorate of who is funding the candidate, which both defines the candidate’s constituencies and show which interests the candidate will likely respond to. “...In *Citizens United*, the Court held that ‘the informational interest alone is sufficient’ to sustain a requirement to disclose ‘who is speaking about a candidate shortly before an election’” (No. 08-5223, p. 14). Secondly, the reporting serves in ensuring campaign finance restrictions are not being violated, and possibly deters some from violating them. This assertion was also upheld in *Buckley* and *McConnell*.

Regarding SpeechNOW’s assertion that the PAC requirement would chill future political speech, similar to the argument of *Citizens United*, the FEC disagrees and claims that the “political science article” used by the plaintiff is incorrect in justifying so.¹⁹ They

¹⁸ These arguments are crucial in understanding why a Super PAC is still under some disclosure regulations.

¹⁹ The article, *Why is there so Little Money in American Politics?*, claims that PACs spend more than half of their total revenue on compliance costs and fundraising. The article does not indicate which percentage is attributable to fundraising and does not distinguish what exact percent is attributable solely to reporting. The FEC cites a recent study of political-committees of *Fortune* 100 companies which claims that reporting and compliance only accounts for 15% of PAC time on average, and that 80% of PACs surveyed had 2 or fewer employees (No. 08-5223, p. 21).

also disagree with SpeechNOW's assertion that the "Major Purpose" test should be abandoned or clarified, as the petitioners never asserted that SpeechNOW would not pass the test, making it irrelevant in the case. "In any event, because making independent expenditures appears to be SpeechNow's *sole* purpose, whatever difficulties of administration the 'major purpose' test might cause in its application to other organizations are not present here" (No. 08-5223, p. 25). They also further that SpeechNOW gave no example of an organization which currently passes the "Major Purpose" test that should not.

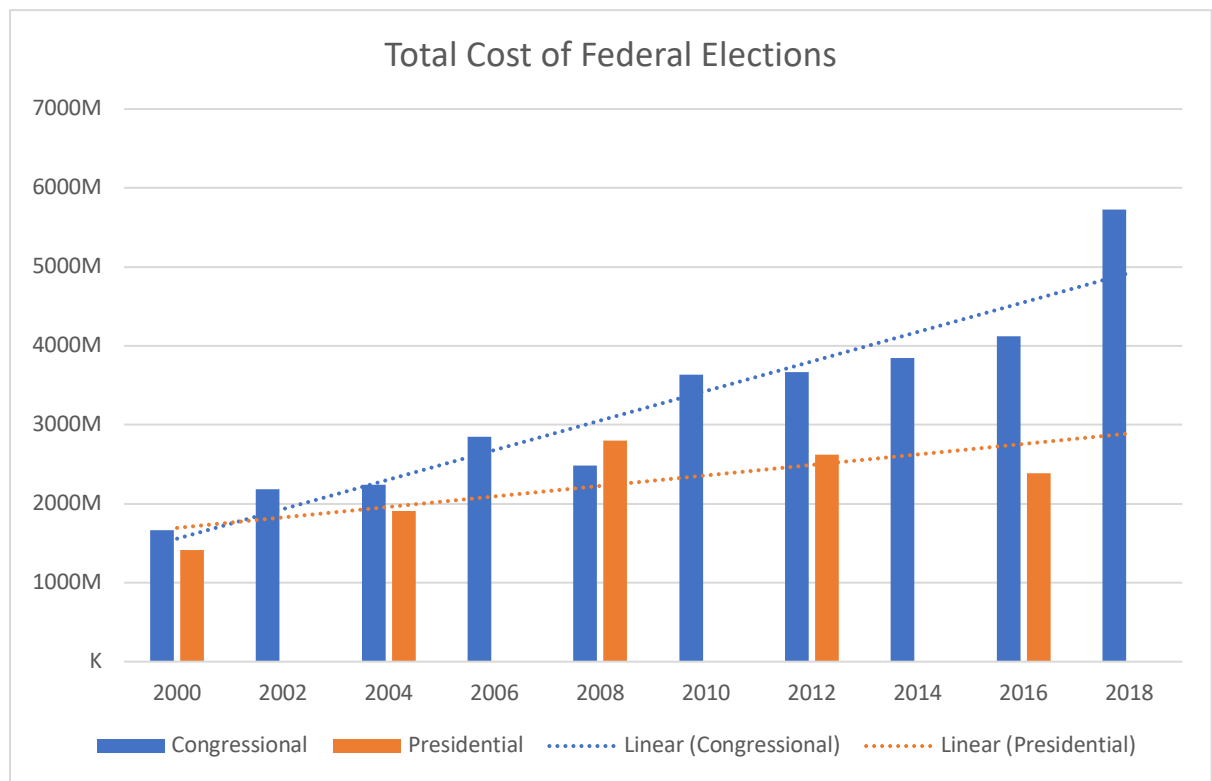
Decision

The opinion for the court was written by Chief Judge David B. Sentelle. The court immediately points to *Citizens United* in its decision, even counter-arguing FEC arguments from *Citizens United*. Ultimately, the court decides that the contribution limits on SpeechNOW are unconstitutional, but the reporting and organizational requirements are constitutional, birthing the Super PAC. They state that courts may only trump First Amendment rights when a countervailing interest outweighs the limit's burden on exercising those rights. Specifically, the Supreme Court has only regarded preventing corruption or the appearance of corruption as doing so. In this case of expenditure limits on SpeechNOW, the court ruled that there is no anticorruption interest. "Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has no anti-corruption interest in limiting independent expenditures" (No. 08-5223). This, of course, hinges on SpeechNOW only participating in independent expenditures, as with *Citizens United*. The court clarifies that SpeechNOW may both make and accept unlimited contributions

only because they are independent expenditures and that direct contributions to candidates are not affected by this ruling. In a more muted tone than in the *Citizens United* decision, however, the court notes, “We do not need to answer whether giving money is speech per se, or if contributions are merely symbolic expressions of general support” (No. 08-5223).

Regarding organization and disclosure requirements, the court rules that they are not sufficient to impend First Amendment rights. In referencing *Buckley*, *McConnell*, and *Citizens United*, “Because disclosure requirements inhibit speech less than do contribution and expenditure limits, the Supreme Court has not limited the government's acceptable interests to anti-corruption alone. Instead, the government may point to any ‘sufficiently important’ governmental interest that bears a substantial relation’ to the disclosure requirement. Indeed, the Court has approvingly noted that ‘disclosure is a less restrictive alternative to more comprehensive regulations of speech’” (No. 08-5223). The court blatantly disagrees with SpeechNOW’s argument that the organizational and reporting requirements of a PAC are too burdensome on freedom of speech. They argue that the difference in the reporting requirements already established on SpeechNOW as a group which makes independent expenditures and the reporting requirements of a PAC is minimal. The court also agrees with the defendant, the FEC’s, argument that the public has an interest in knowing who is funding the speech about a candidate, whether it be administrative costs or independent expenditures. Further, they agree that this disclosure deters and helps to expose campaign finance restriction violations.

CHAPTER IV- SUPER PACS BY THE NUMBERS

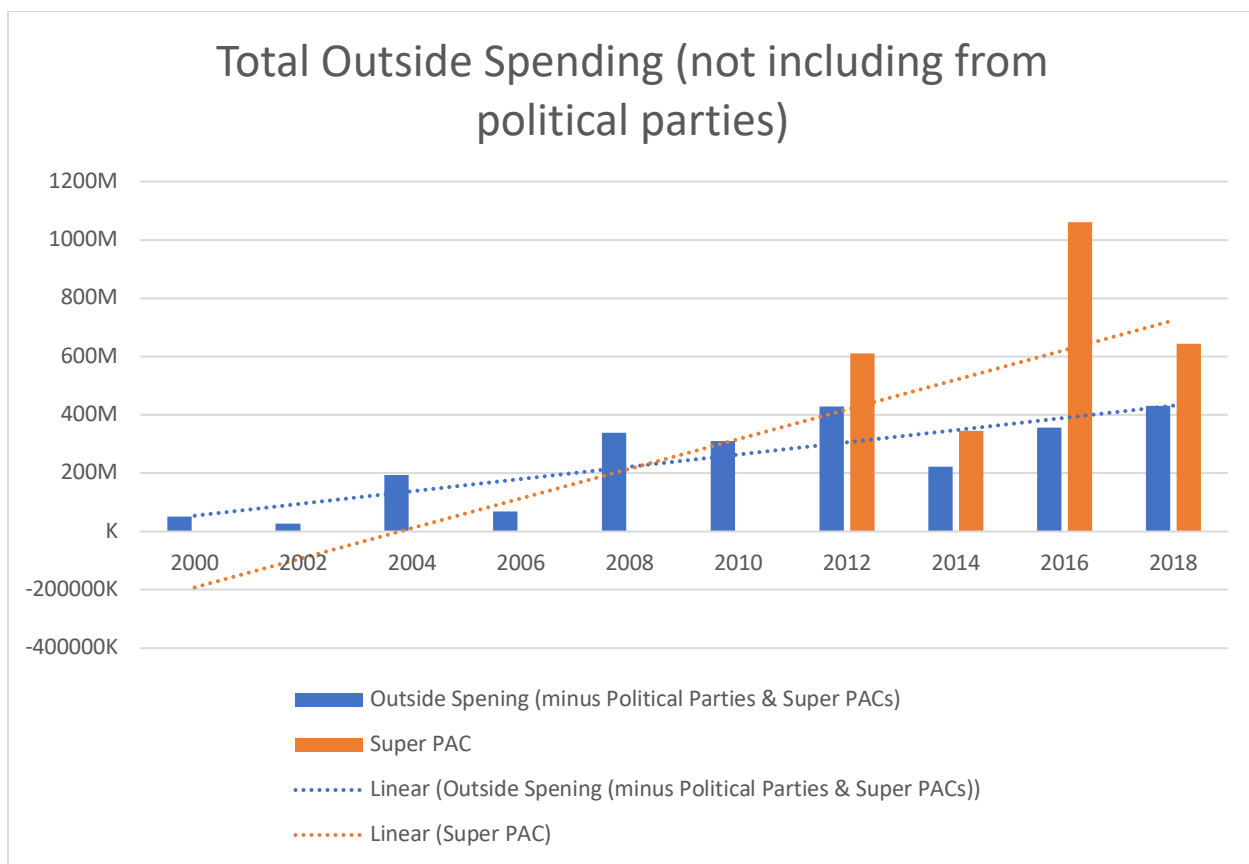


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When considering the impact Super PACs have had on campaign finance and on the overall federal election system, there are multiple measures to interpret. In both *Citizens United* and *SpeechNow*, the plaintiffs and the Courts asserted that expenditure limitations on corporations and PACs chill political speech. This graph represents the

²⁰ “Cost of Election,” 2019.

total amount spent on federal elections, both Congressional (blue) and Presidential (orange) by year. This spending includes direct contributions as well as independent interest group spending, including that of Super PACs. There is not a dramatic increase in spending following 2010, when Super PAC independent expenditures became legal. However, it is important to note that campaign spending was already increasing most every year prior to the *Citizens United* decision, meaning that the introduction of Super PACs is not solely responsible for any increases in total election costs after 2012. These data can modestly help support the claim that expenditure limits, which were in effect prior to 2012, chill political speech, as once the limits were lifted upon the introduction of Super PACs, there are increases in overall campaign spending, or political speech.

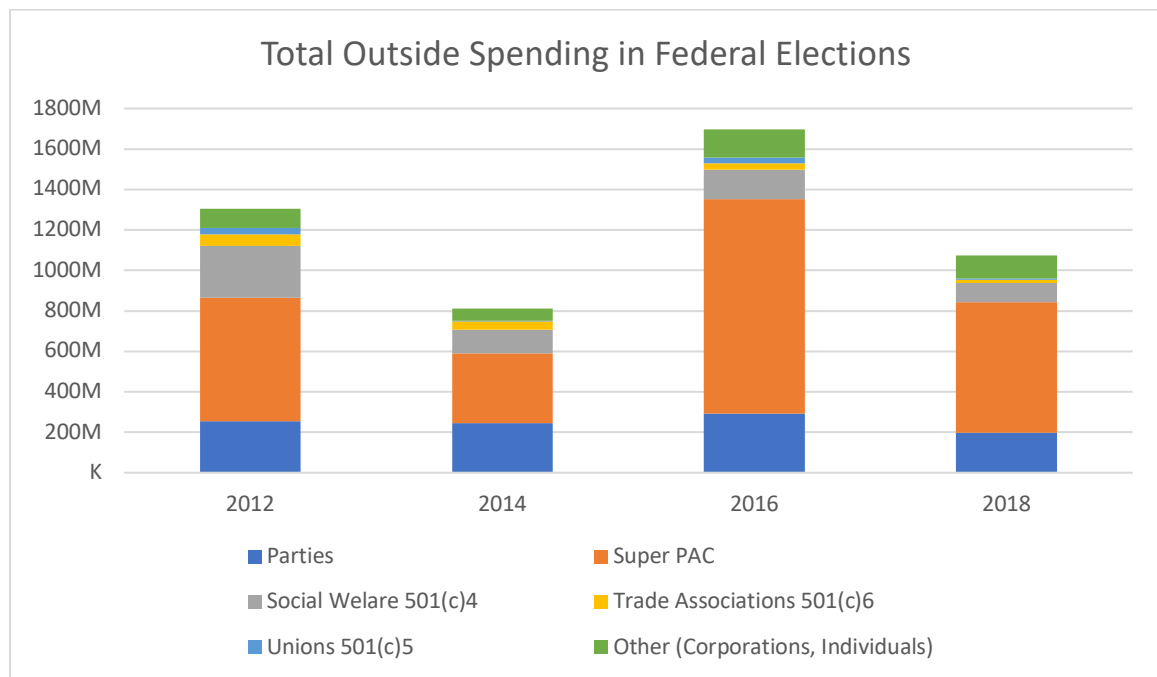


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This graph shows the total outside spending, minus contributions from political parties, from 2000-2018. Notably, there is a major increase from 2002 to 2004. 2004 was the first election cycle in which electioneering communications were utilized as independent expenditures. An even bigger increase occurs between 2010 and 2012, specifically from the birth of Super PACs. In one election cycle alone, Super PACs over tripled the amount spent on independent expenditures. This can also be used to support the assertion by the courts and plaintiffs in *Citizens United* and *SpeechNow* that independent expenditure limitations chilled political speech. Clearly, corporations and

21 “Total Outside Spending by Election Cycle, Excluding Party Committees,” 2019.

organizations which formed Super PACs were not participating as fully in the political process prior to being able to participate limitlessly as Super PACs. This also represents the impact Super PACs have today on the political process. Prior to Super PACs, less than a third was being spent on campaign independent expenditures than is spent today, making it clear that Super PACs have become an integral component of modern-day elections and that their impact is important.

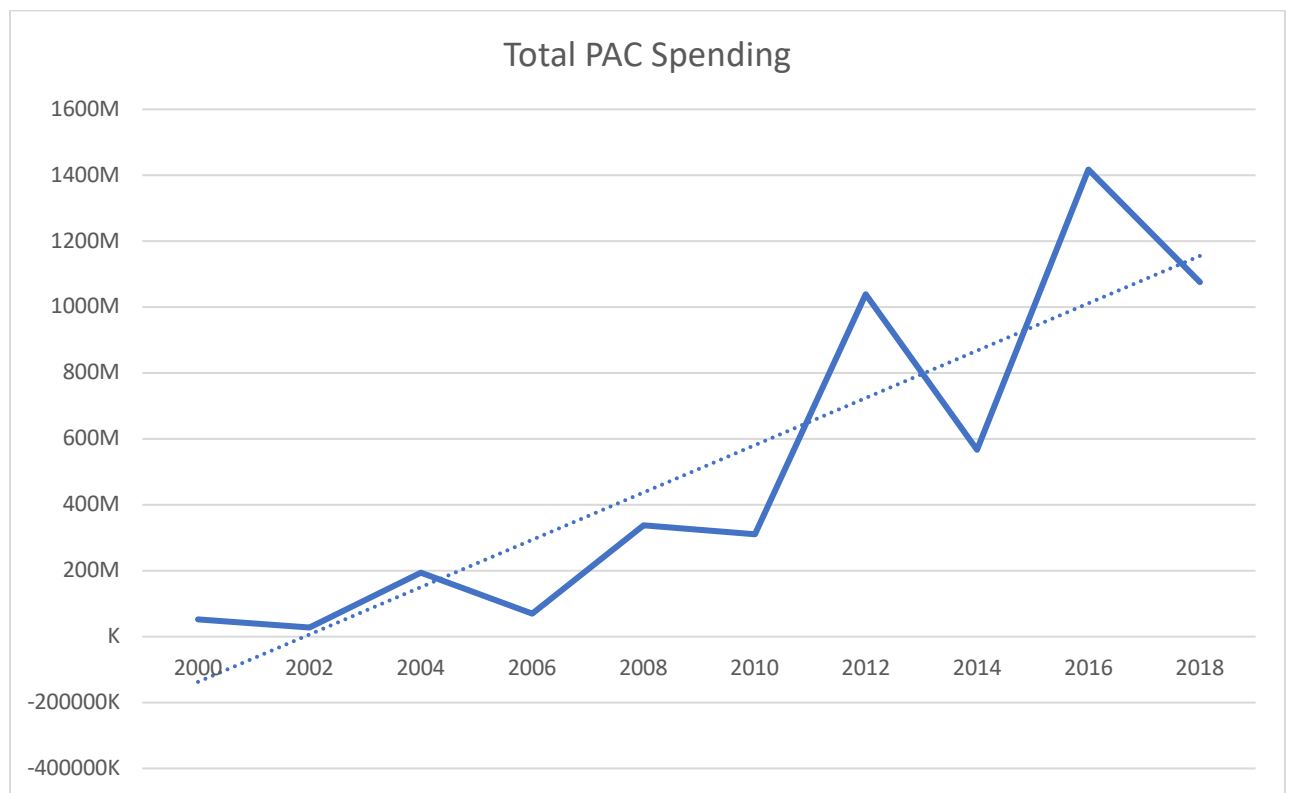


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More specifically, this graph shows the total outside spending of each election cycle post-*Citizens United*. It breaks down the total outside spending by type, separated into political parties, social welfare groups, unions, Super PACs, trade associations, and other. Super PACs account for the majority of outside spending in each election cycle.

²² “Total Outside Spending by Election Cycle, Excluding Party Committees,” 2019.

Total outside spending is higher in 2012 and 2016 as both are presidential election cycles. As Super PACs were non-existent before the 2012 election cycle, this demonstrates how much of an impact they had on both how much outside spending occurred and how the outside spending was funded. It also shows that other participants in independent expenditures have not just funneled their donations into Super PACs and away from how they used to donate. All the other categories have remained somewhat consistent, if not increased, even with the introduction of Super PACs.



23

When considering total PAC spending in federal campaigns since 2000, it is once again clear how the *Citizens United* decision impacted PAC spending. With the

²³ "Total Outside Spending by Election Cycle, Excluding Party Committees," 2019.

introduction of Super PACS to campaign finance in the 2012 election cycle, total PAC spending increased by 235.43% in one cycle. Between 2010 and 2018, the last election cycle without Super PACs and the most recent election cycle with Super PACs, total PAC spending increased by 247.34%. Between 2010 and 2016, the last election cycle without Super PACs and the election cycle with the highest PAC spending, overall PAC spending increased by 357.49%. Each presidential cycle has considerably higher total spending, as it accounts for more elections than in a non-presidential election year, which only has Congressional campaign spending. While this chart does not distinguish between regular PAC spending and Super PAC spending, the sharp increases in PAC spending immediately following *Citizens United* show that Super PAC spending accounts for a vast majority of the increased overall PAC spending.²⁴

²⁴ All graphs in this chapter use the time frame of 2000-2018, when the data are available. 2000 is chosen as the starting point, as that was the election cycle when independent expenditures, especially in the form of media advertisements, became more popular, and it represents the last two decades of campaign finance. 2018 is the most recent election cycle for which complete data is available. 2012 was the first election cycle after *Citizens United*, meaning it was the first election cycle in which Super PACs were active. Some graphs only use 2012-2018 for the timeline as they are specifically about Super PACs, so there are no Super PAC data available prior to 2012.

CHAPTER V- CONCLUSION

Campaign finance as an issue which deems federal intervention has been prominent since the days of the first president of the United States. Early campaign finance focused on specific legislation which limited types of donors or types of donations in order to ensure more equality and accessibility in elections. However, much of this early campaign finance legislation and subsequent court cases was not highly enforced. It was not until 1967 that Congress took a greater stake in enforcing its campaign finance legislation through actually collecting campaign finance reports. The modern era of campaign finance law is a culmination of court cases and legislation which all cover varying views on the effects of campaign finance and on the rights of its donors.

The Federal Elections Campaign Acts of 1971, and its 1974 amendment, ushered in this modern era of campaign finance by legislating a governing body over federal campaign finance regulation, the FEC, and by creating a comprehensive set of legislation regarding the levying and spending of campaign funds. A challenge to the constitutionality of the FECA in *Buckley v. Valeo* in 1976 found portions of the FECA to be unconstitutional as it set the precedent for regarding campaign finance as a form of free speech protected by the Constitution. Most importantly, the case struck down limits on campaign expenditures, limits on independent spending, and limits on expenditures of

candidates' personal funds, while upholding limits on contributions. Thirteen years later, in 1989, a prominent campaign finance scandal once again brought campaign finance to national attention and called for more reform. In the Keating Five Scandal, five senators were accused of accepting large donations from the owner of a bank impending failure and for unethically interfering with its closure. Senator John McCain, who was indicted in the case but not found guilty, sought to personally reform campaign finance to remove the scandal from his political legacy. In 2002, the Bipartisan Campaign Reform Act, better known as BCRA or the McCain-Feingold Act, was passed as a major amendment to the FECA. The BCRA sought to close the loophole of soft money in campaigns. Namely, it raised the limit on contributions by individuals and banned federal candidates or their parties from soliciting, receiving, or directing money from any person or organization not following the FECA guidelines and prohibited the use of electioneering communications by corporations or trade unions. Both of these major reforms were upheld by the Supreme Court in *McConnell v. FEC* in 2003.

Most prominently, and most importantly in this work, Super PACs have become the essence of today's campaign finance law. On January 10, 2010, the ruling in *Citizens United v. FEC* paved the way for the creation of Super PACs. Citizens United, a nonprofit company, had planned to televise its film, *Hillary: The Movie*, for all viewers on video on demand and to advertise for the film with commercials. However, as the film was specifically about a candidate, Hillary Clinton, and would be accessible within 30 days of a federal election using electioneering communications from a corporate treasury, showing the film would be a felony under the FECA. Citizens United questioned the constitutionality of this law, eventually leaving it to the Supreme Court to determine whether the FECA limits the group's First Amendment right to free speech. The case

ultimately became about whether the decisions made in *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC* were applicable to a nonprofit group such as Citizens United in the case of campaign finance. Justice Kennedy delivered the majority opinion in a 5-4 decision in favor of Citizens United. The court ruled that §441b of the FECA, making the funding of the film a felony, was only ever legitimate because of the *Austin* decision, but that the *Austin* decision was unconstitutional and did not follow prior court precedent. This overrule of *Austin* also overruled portions of *McConnell v. FEC*, specifically those which put limits on electioneering communications. The ruling in favor of Citizens United overturned any limits on independent expenditures by corporations, legalizing one of the major components of a Super PAC.

However, Super PACs were not officially legal until the decision in *SpeechNOW.org v FEC* on March 26, 2010, just months after the *Citizens United* decision. SpeechNOW, a nonprofit organization, filed a suit in the District Court for the District of Columbia in February of 2008 regarding the legislation requiring them to register as a PAC. While SpeechNOW only accepts donations from individuals, and not corporations, under the FECA, they were required to register as a political action committee upon raising \$1,000 and faced contribution limits as such. The District Court denied the request for a preliminary injunction, but SpeechNOW appealed to the Court of Appeals, which then made a decision in the case following the *Citizens United* decision. The court made its decision following *stare decisis* of *Citizens United*. They ruled that any contribution limits on SpeechNOW are unconstitutional, as they limit free speech and chill political speech of corporations, but that reporting and organizational requirements of a PAC are constitutional, as they are not burdensome enough to limit free speech.

The combination of the *Citizens United* and *SpeechNow.org* decisions created the Super PAC, an unlimited independent expenditure only political action committee. By legalizing unlimited independent expenditures for both corporations and organizations which register and comply with regulations of PACs, the two court decisions morphed into an organization which allows unlimited independent expenditures. Super PACs quickly entered the arena of federal campaign finance, becoming a major component of both total spending and outside spending in 2012, the first cycle in which they were legal. The data regarding Super PACs' influence on federal elections strictly in contribution amounts from 2012 to present day elections credits it as a massive influence. To go from having no direct place in campaign finance to amounting to over 60% of total outside spending in federal elections in less than six years, the impact and influence of Super PACs on campaigns cannot be understated.

While many, usually on the right, such as Justice Kennedy, would consider this influence by Super PACs as a win for free speech by allowing corporations to fulfill their practice of unlimited donations, others, usually on the left, consider the intense growth of Super PACs to be a dangerous gateway for more dark money and influences to enter politics and government. As candidates enter the Democratic primary for the 2020 presidential election, many have vowed to not accept any large money donations or donations from PACs or Super PACs in order to stand by their disapproval of big or dark money in politics. However, when it comes to Super PACs, candidates have no say in if they are funded by them or not. Because Super PACs can only participate in elections through independent expenditures, they can never have direct contact with a candidate or his or her campaign team. Whether or not a candidate wants to be associated with a Super PAC is ultimately not up to them. For example, candidate Cory Booker has rejected any

money from corporate PACs and has publicly vowed to not accept any big money contributions, but a wealthy Democratic donor has launched a Super PAC in support of Booker (Robillard, 2019).

Even if Democratic candidates could successfully keep Super PACs from forming and working in favor of their campaigns, could they have any success in the election without such big money donations? With Super PACs making up a majority of spending in elections, to completely rule them out would mean a major disadvantage for the candidate in terms of amount spent. In an increasingly media-driven world, these donations have an even greater impact. As Super PACs typically use independent expenditures to promote the candidate or oppose its competition specifically in the media, efforts by Super PACs are some of the most influential parts of the campaign in terms of the public. If a Democratic candidate were to free his or herself from any Super PAC endorsements while the Republican candidate reaped the benefits of Super PAC endorsements, it would undoubtedly have a negative effect on the Democratic nominee. While these candidates are disavowing Super PAC money in order to take an ideological stance against it, it greatly hinders their ability to be elected to the position in which they could actually work to reform campaign finance.

Despite claims and platforms of many candidates promising to erode campaign finance of dark money or big donors, there is no way to completely eradicate money from politics without turning to publicly funded campaigns, a concept inconceivable to many in the reality of American ideologies. However, in 2016, the state of California passed Senate Bill 1107, which would pave the way for its state and local governments to establish public financing programs for candidates running in state and local elections. The bill was overruled by a court decision in which the Howard Jarvis Taxpayers

Association challenged SB 1107. The lower court ruled that the bill was improperly applied to the Political Reform Act of 1974, California's major piece of campaign finance reform legislation post-Watergate, as it did not further the act's purpose (Berger, 2019). This is just one example of the possibility of public financing entering American politics, but it clearly would have a long way to go to ever become the reality for all federal elections, ridding them of outside funding. But even with public funding, would Super PACs immediately be made illegal? As they are outside spending and have no communication with the candidate and his or her campaign team, they could be viewed separately from the public funding, potentially still leaving a loophole many are trying to close in campaign finance.

Beyond the question of whether candidates can or should be supported by outside, dark sources, the question of anonymity is a major concern for Super PACs. Earlier, when discussing the different arguments for and against the anonymity of donors to Super PACs, the question was left of whether or not the anonymity or public transparency of political campaign donors actually matters to a democracy. When considering the question solely in terms of Super PACs, it has a give or take answer. The data regarding campaign finance both before and after the legality of Super PACs make it evident that there is increased political participation due to Super PACs, which is increased democracy, as more voices are allowed to be heard and to be heard louder in the political system. However, this comes with the take to consider that now more than ever, the American people have no public knowledge of who is participating in the political system, decreasing transparency and accessibility, and therefore democracy itself. There is no clear answer to whether Super PACs are a good thing for democracy, but there is a clear answer that Super PACs have immense, and increasing, influence over

campaigns, and therefore over the political system. In order to accept the increased political voice Super PACs allow individuals and corporations to have, one must be comfortable with not knowing who those donors are and where their intentions lie in making such donations.

In the months following the *Citizens United* decision, the Brennan Center for Justice at the New York University School of Law conducted a survey to gauge public response to the decision. Sixty-nine percent of respondents answered that “new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption,” with 74% of Republicans and 73% of Democrats agreeing to the statement. 73% of respondents also agreed that “there would be less corruption if there were limits on how much money could be given to Super PACs.” More than three-quarters of all respondents agreed that members of Congress are “more likely to act in the interest of a group that spent millions to elect them than to act in the public interest” and two in three Americans said they “trust government less because big donors to Super PACs have more influence than regular voters” (Brennan Center for Justice, 2012). Six years later, in 2018, after Super PACs had been active in multiple election cycles, Pew Research Center conducted a similar survey. 77% of respondents supported “limits on the amount of money individuals and organizations can spend on political campaigns and issues.” Similarly, nearly two thirds said that new laws could be “effective in reducing the role of money in politics” (“The Public, The Political System...”, 2019). These surveys suggest a more bipartisan opposition to Super PACs and their role in bringing dark money into politics.

Making the question over anonymity and democracy even more complex, one must not forget that Super PACs are completely independent of the candidates they

support or oppose, meaning they are not acting in collaboration with the candidate or their team and thus cannot and should not be influencing the candidate's political actions. The fact that Super PACs can only make independent expenditures is what makes them legal, as they are supporting a corporation or individual's freedom of speech. Super PACs are acting on their own accord whenever they make decisions in how to publicly support or oppose a candidate. Candidates are not making their platform or political decisions in order to garner donations from anonymous Super PAC donors, because they legally and strictly cannot interact with such donors. Although Super PACs allow increased political participation by some, they are not equalizing political participation for all. Super PACs favor those with money and those able to organize their money for a specific interest. Because of this, Super PACs are unsustainable in a democracy. As explained previously, they put candidates at greater advantages and disadvantages than others, regardless of what decisions the candidates may make. Direct interaction between the candidate and a Super PAC is in conflict with their legality, but their lack of direct interaction is also what makes Super PACs unsustainable. Without the ability to control a Super PAC's moves or motives, or without the ability to decide if one even wants to be supported by a Super PAC, Super PACs can easily be useless, if not harmful, to the candidates they are alleging to support.

Despite the refutable evidence that Super PACs are playing an increased role and having an increased influence in federal elections, public opinion surveys have made it clear the American majority is against the role dark money is playing in politics today. In order to maintain a democracy in which each American can have their voice heard equally and can experience as equal of political participation as possible, unlimited and anonymous donations cannot be such an integral component of all federal elections.

When the voices of corporations are overpowering the voices of Americans themselves, as is seen by the percentage of Super PAC donations in recent election cycles, the corporation's right to speech becomes more important than the individual's right to speech. However, it is the individual who gets to elect their representative, and thus it should be the individual who gets the opportunity to participate in influencing elections. Super PACs fail to protect the interests of voters by turning elections into a monetary contest of which candidate can raise the most money from nameless and unknown corporations and wealthy individuals. Equating political participation for all Americans should be a primary goal in a democracy but is one which Super PACs fail to meet.

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